IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLIE LOUIE,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

No. 2403

Brief of Defendant in Error

CLAY ALLEN,
United States Attorney.
ALBERT MOODIE,
Assitant United States Attorney.
Seattle, Washington.

Smiley Litho. & Printing Co., 72 Columbia Street, Seattle

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STATEMENT OF THE CASE.

The issues offered in the present appeal are sufficiently narrow that they require no lengthy statement supplemental to that offered by counsel for plaintiff in error.

The plaintiff in error, Charlie Louie, was first indicted, together with one James A. Ralston, charged with conspiring to commit a crime against the United States, in violation of Section 5440 of the Revised Statutes of the United States. This indictment (p. 11 S. F.) contained but a single count and employed the usual and ordinary terms in description, charging that the defendants did "conspire, confederate and agree together to commit an offense against the United States." The crime which it is charged was to be perpetrated was that of "assisting in transporting and bringing into the United States" opium prepared for smoking in some quantity or amount not therein more fully described. After setting forth the object and means by which the conspirators had agreed to consummate the offense, the indictment sets forth nine separate overt acts. All of these overt acts, except two, allege specific acts, either of concealment or introduction by one or the other of the defendants of no less than five consignments of opium. A trial upon the charge of conspiracy having been had, the defendants were acquitted.

Thereafter another indictment embracing eight

counts was returned against the same defendants. The several counts of this indictment charged the violation of the Act of February 9, 1909, Chapter 100, Supplement 1909, p. 180, which prohibits the importation of opium.

The defendant Ralston thereafter entered his plea of guilty to a similar charge brought against him in the United States Court for the District of Oregon, and was sentenced to serve a term in the federal penitentiary at McNeil Island. The plaintiff in error was then tried upon the charges of the last mentioned indictment and a verdict of guilty was returned as to the second count. The plaintiff in error seeks to reverse the judgment of the court as based upon this verdict.

The evidence in the case disclosed a close and intimate friendship, extending over some months, between the defendants Louie, a Chinese, though of American birth, and Ralston, a white man. They had travelled together on extended trips to Chicago, Illinois, Butte, Montana, and Portland, Oregon, and upon one occasion they had visited the latter city and there the defendant Ralston registered under an assumed name. Louie had called up the other de-

fendant by telephone in Seattle and advised him that another Chinese would call Ralston up and tell him where he could get a consignment of opium. Ralston obtained a suit case and Louie and Ralston then traveled on the same train from Seattle to Portland, where both were arrested.

The letters referred to in the present record were found in the defendant Louie's trunk.

ARGUMENT.

Point I.

The first contention made by the plaintiff in error is to the effect that his acquittal by the jury of the charge laid in the conspiracy indictment should bar a subsequent prosecution for the consummated offense.

The contention of the plaintiff in error is not sustained by the decisions of the various courts to which similar questions have been presented. The attention of the court is directed to the opinion of Judge Bradford, speaking for the majority of the court in the case of *Berkowitz vs. United States*, 93 Federal 452, in which the facts quite nearly parallel the case at bar. Berkowitz and his alleged

co-conspirator were charged with violation of the conspiracy section (5440) of the federal code. The indictment charged the defendants with conspiring to violate a section of the penal code and alleged as overt acts the payment of money to five different persons. An acquittal having been had, Berkowitz was then charged with the direct offense of unlawfully selling, etc., false certificates, and *the same five persons are named.* It was there contended, as here insisted, that the facts were identical and that the acquittal as to the one offense should bar the prosecution for the other. But the majority of the court held to the opinion that the direct offense was not intended to be, and was not in fact, inclusive of the crime of conspiracy. It was there suggested that both were then, in fact, misdemeanors.

While the reasoning of the court, as we view it, is undoubtedly sound, there is yet a wider theory which sustains the court's position. The offense of conspiracy defined in Section 5440 is one *not inclusive* but *exclusive* of all other offenses. It begins with the formation of the criminal purpose and quite often falls short of the consummation of the stated offense. This section is designed to punish

the plotting and scheming of those wicked minds which show themselves, by a single overt act, ready to launch their unlawful enterprise. The agreement, the conspiring together, is itself the offense; the overt act is no part of it, as the supreme court has already declared.

Illustrations of inclusive classes of crimes occur readily to the mind. The crime of murder in the first degree is inclusive of all the varying degrees of murder, manslaughter and assault, for the consummation of the greater crime of murder means necessarily that all the lesser included offenses have been, at one and the same time consummated. When murder is committed, whether by blow or poison, the least of all crimes, a technical assault, is also committed. The latter is an included offense. It must be present. No such comparison can be made between a charge of conspiracy and that of introducing opium and aiding its transportation. Ralston and Louie may have conspired to introduce opium into the country unlawfully, and thereafter prepared a letter to forward their unlawful purpose. Through negligence the letter or opium might have miscarried and the arrangement thereby fail of consummation. They would still be guilty of a vio-

lation of the conspiracy section, and not guilty of the consummated offense. On the other hand, Louie might, upon his own initiative, and without the knowledge of Ralston and without any evidence of concert or conspiracy with any one, have set under way his enterprise, and Ralston thereafter assisted in the transportation of the opium without any actual knowledge of Louie's part in the matter, and both be guilty of the consummated offense.

The distinction contended for, on behalf of the government, is bluntly and definitely made in the case of *Britton vs. United States* (Okla.), 27 L. Ed. 699, 108 U. S. 199.

The court, speaking through Justice Woods, said:

> "The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentioe,* so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute."

Accepting the rule of the supreme court, the

conspiracy indictment here is stript of every allegation as to specific acts, and becomes a general charge of conspiracy to unlawfully import opium in some amount neither mentioned nor described.

The attention of the court is further called to the case of *United States vs. Scott,* 139 Federal 697.

In the *Scott* case the question arose as to Sections 5440 and 3296, the latter imposing a penalty for removing distilled spirits in violation of law. The penalty under the latter section was by fine and imprisonment for a period of not less than three months nor more than three years, while the conspiracy, then as now, was punishable by imprisonment for any period not more than two years. The court holds both offenses to be misdemeanors and states: "It is perfectly clear that the rule of merger does not apply here, where the penalty is so nearly alike as it is under Sections 5440 and 3296."

In the case at bar the punishment provided for smuggling is practically identical with that provided for the crime of conspiracy; that is, not in excess of two years imprisonment. Since, however, the Act of March 4, 1909, Section 335, Penal Code,

both of these offenses would be described as felonious. That section provides:

> "All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonious. All other offenses shall be deemed misdemeanors."

It was formerly contended, early in the history of conspiracy litigation, that a defendant could not be charged and tried for conspiracy where the offense was actually consummated. Courts quite generally, however, repudiated the doctrine of merger and permit the charge as to either.

> *People vs. Peterson,* 31 Northwestern 188.
>
> *Wait vs. Commonwealth,* 69 S. W. Rep. 697, (Court of App., Ky.)
>
> *Regent vs. People,* 96 Ill. App. 189.
>
> *Graff vs. People,* 70 Northeastern 299-303, (Supreme Court Illinois).

Judge Ricks here speaking for the court with reference to suggested "merger" of the crime of conspiracy into the consummated offense, says:

> "And it is believed that, by the greater weight of authority, the rule of merger, as formerly existing at common law, has been to a great extent abrograted, and confined to very narrow limits."

Counsel for plaintiff in error have cited *Wharton on Criminal Evidence.* The attention of the court is directed to the statement of the same text-writer, found at page 508, First Volume, Eleventh Edition, quoted in part as follows: *"On plea of former acquittal or conviction, the accused must show that he was acquitted* or convicted of the same accusation against him in a former trial; *not of an entirely different offense growing out of the same state of facts or transaction."* (Writer's italics.)

Wharton cites among other cases that of

> *Hooper vs. State,* 30 Texas Appeals 411, 28 American St. 927.

Hooper had been tried and acquitted of uttering or passing a forged instrument. He was re-indicted for forgery of the same instrument. We quote from Mr. Justice White:

> "The forgery of an instrument and the passing of a forged instrument are two separate and distinct offenses as denounced by our code, and separate penalties are affixed to the commission of the two offenses. *Under an indictment for forgery, a party cannot be* convicted and punished for passing a forged instrument, and *vice versa."*

While there is no statement by the court, it is

quite apparent that the evidence on both trials was substantially the same. Proof of the false character of the instrument was essential to each charge.

Mr. Justice White also emphasized that in order for defendant to avail himself of the defense of *autrefois acquit* "proof must be made by showing the identity of the very acts or omissions which constitute the offense—that the acts which constitute the offense for which the former acquittal was had are the very acts which constitute the offense on trial."

In *State vs. Williams,* 12 So. 932, defendant was charged with grand larceny of goods belonging to a *Miss* Waters. He plead former acquittal, on a charge of grand larceny of the identical goods, alleged to be the property of a *Mr.* Waters. Justice Fenner of the supreme court of Louisiana held that the test on plea of former acquittal is whether the evidence necessary to support the second indictment would have sustained a legal conviction on the first, and denied the plea, saying that the evidence in the second case would have acquitted in the first.

It is respectfully submitted that in the case at bar there is nothing in this transcript to show that

any evidence relative to the 64 five-tael tins described in the count (two) upon which Louie was convicted at the last trial was ever mentioned, or evidence offered relative to that transaction in the conspiracy trial. It will be remembered that the conspiracy indictment in the overt acts alone reference is made to no less than *five different* quantities of opium, as well as other overt acts. Proof of any one of these would have been sufficient to "make good" the evidence in the conspiracy case, and the record is silent, both as to pleadings and evidence on the point as to the evidence used on that occasion. In other words, the plaintiff is complaining of a "deadly parallel" as to words used in the two indictments, while in fact the true rule, under the most liberal construction, is *as to the evidence offered in each case.*

Counsel have cited for consideration by the court the case of *Ball vs. United States,* 163 U. S. 662, 41 L. Ed. 300. The defendant, Ball, was indicted, tried and acquitted by a jury, the indictment thereafter having been held defective. The defendant was then re-indicted and tried, and the supreme court held the former acquittal a bar to a new in-

dictment for the same offense, charging the same crime. The crime charged in each case was murder. The facts relied upon were the same, with additional proof of the time of the victim's death. In the case at bar neither the charges nor the facts are the same.

The case of *Ex Parte Nielsen,* 131 U. S. 176, 33 L. Ed. 118, cited by counsel, is illustrative of the class of included offenses. The defendant Nielsen was charged with the continuing offense of unlawful cohabitation. A plea of guilty having been entered, the sentence imposed was held to be a bar to charges of single acts of adultery. The court states, "It included the adultery charge."

Point II.

It will not be necessary to consider this point separately inasmuch as it is covered by the discussion of Point I.

Point III.

The third point submitted in the brief of plaintiff in error is in regard to the introduction of certain letters in evidence. These letters, sixteen in number, are set out from pages 54 to 61, inclusive,

of the transcript herein. The history of these letters varies in certain instances. The testimony of Guy M. Watkins, called on behalf of the government (p. 26 Tr.) was that he had arrested Charlie Louie on the night of July 5th (1913), and thereafter had taken him to Watkins' office for the purpose of an examination. The witness further states that preliminary to the search Louie walked back and forth close to the wardrobe in the room, and during this period of time the witness was busy searching certain trunks belonging to the defendant Ralston, with his back turned to the defendant Louie. While the record does not so state, it was apparent that something had aroused the suspicion of the witness, and after searching Louie and finding nothing upon him he made a search in the bureau referred to and there found the exhibits 1 and 2. Attention is called to the fact that these exhibits, which it was entirely reasonable for the jury to conclude had but recently come from the person of Louie, make reference to "foreign goods in this place is 28 to 28½ at present. Please let me know as to the market in your city," etc.

The witness, Edward D. Lemarge (p. 26 Tr.),

testified that exhibits 3 to 9, inclusive, and 11 to 13, inclusive, together with their respective envelopes, had been found by him on the 6th of March, 1913, in a trunk in the residence of the defendant Louie.

The transcript does not clearly disclose the facts relative to the admission of these various letters. The situation as developed in the trial is briefly this:

The letters 1 and 2 found in the wardrobe had been admitted by the court and the other letters were first offered in evidence and rejected by the court, and were not admitted during the government's case in chief. After the government had rested and the defendant Louie was called on behalf of the defense, he stated in his direct examination by his counsel that he had never handled opium. The court very properly permitted counsel for the government to cross-examine Louie with reference to these letters. Louie then admitted that all those letters admitted in evidence were either written by him or to him, and upon the basis of this statement they were admitted into the record by the court.

The transcript as proposed and certified shows

that exhibit 14 was offered in evidence (p. 28 Tr.) and objected to as immaterial, irrelevant and incompetent. There is no other or further objection, and it is safe to assume that being so general in its character no right is preserved to the defendant.

It is suggested by counsel for plaintiff in error that there is nothing to identify these letters with the defendant or with the offense for which he was on trial. Counsel makes a further suggestion that only by innuendo can it possibly be contended that they refer to opium. In that connection the attention of the court is called to certain interesting phases generally found and recurring in these various letters, such as:

> "* * * not first class goods, but like sweet liquid."
>
> "* * * who bought 30 tins, selling price $24.50 each tin," etc.
>
> "* * * brought 60 tins, selling price $24.75 each tin."
>
> "* * * black goods on hand at present," etc.
>
> "* * * and do not buy the sweet liquid."

The court will read these letters with some in-

terest and probably some amusement that it can be suggested that an intelligent man conversant with the habits and customs of Chinese people could ever be at a loss to know the subject matter of this generally ingenious Chinese correspondence.

It is sometimes the disposition of counsel to assume that courts are less intelligent than the average run of humanity. We must assume that the trial court and this appellate tribunal are generally conversant with the habits of the Chinese people within their district. The Chinese people are the great merchants of the world, and the singular fact that fourteen or fifteen letters are written without mentioning the particular commodity or goods which is the subject matter of the conversation is in itself so significant a fact that it causes no surprise that a jury should consider the subject matter to be that staple commodity which is itself "handled in tins," is somewhat like "sweet liquid," and is "black goods" generally worth in this market from $18.00 to $30.00 per tin.

The transcript is not complete and does not set forth the numerous bits of evidence which weave this case closely around the defendant Louie. The

purchase by Louie and Ralston of a trunk in which opium was transported; the traveling to and fro with Ralston; the visits to the home of the witnesses Marian Bergman and Emma Friedland; and mysterious telephonic communication by Louie to Ralston telling that he will be advised "where to go and get the stuff";the statement of Ralston that pursuant to these mysterious instructions so given he had gone to a certain spot and there secured opium contained in a sack; that the opium was the same opium which was carried in the trunk, checked on the very trip taken by Louie and Ralston to Portland; and the sack produced in the court room was the very sack which had contained the opium obtained in this mysterious way pursuant to the suggestion of Louie. All these are necessary facts for the court to know in order that it may have a clear understanding of the meaning of some of the letters offered as exhibits. The letter signed "Your Chas." and written to his wife was a letter which Louie admitted he had sent by mail to his wife, and which was afterwards found in a trunk in his home.

With these facts before the court, no extended argument is necessary to justify the admission of

each and all of the exhibits offered in evidence. The rule of law which permits the offer in evidence of facts relative to other misdemeanors or similar occurrences is too well known to require voluminous citations. It is apparent that whenever motive, intent, knowledge or identity are questions necessary to be proven, that evidence as to other offenses of similar character may be shown. In the case at bar the evidence showed the association and contact with Ralston and the doing of certain things which might or might not be harmless or criminal. If Louie had no wrong intent when he insisted in purchasing a trunk or no wrong intent in his telephone message to Ralston telling him of the mysterious telephone call to come, then he would not be guilty of this offense. If, on the other hand, he had from time to time handled opium and had on other occasions engaged in the barter and sale of this drug, it becomes evidence conclusive in its character as to his motive and purpose in this particular transaction.

Jones in his excellent work on evidence in Volume I, p. 726, says:

"Thus on trials for uttering counterfeit

> bills or coin and forged instruments, it has long been the practice to admit evidence of the uttering of similar counterfeit money or forgeries to other persons about the same time, for while in a single case the uttering of counterfeit money might be perfectly consistent with innocence, the probabilities of guilty knowledge rapidly increase on proof of a continued dealing in the unlawful money."

The same rule obtains with reference to all similar offenses where the motive of the defendant becomes an integral part of the crime itself. No discussion of the authorities on this subject is necessary.

Special reference is made to the case of *People vs. Molineux,* 62 L. R. A. 193, 168 N. Y. 264, the leading case on admission of evidence of other offenses, which has exhaustive notes appended. Also see—

Commonwealth vs. Scott, 25 Am. R. 81, 123 Mass. 222.

Thiede vs. Utah, 40 L. Ed. 242, 159 U. S. 517.

Clune vs. U. S., 40 L. Ed. 269, 159 U. S. 590.

State vs. Hennessey, 5 S. W. 215, 14 Cen. Dig., Sec. 822-5, 6 Sec. Dig., Sec. 369, *et seq.*

Point IV.

The testimony of Maggie McLean was admis-

sible to show the relations existing between Ralston and defendant Louie, and to negative the idea of casual acquaintance. Its admission could not be considered prejudicial error in any event.

Point V.

The testimony of Hamer, Marian Bergman and Emma Friedland was admissible for the reasons hereinbefore last mentioned. Ralston was living, or occasionally staying, at the home of these two women witnesses. Louie kept constantly in touch with Ralston through the telephone of one of the witnesses. Louie visited there and, unless practically all the authorities are wrong, the relation existing between Ralston and Louie was a question of prime importance for the jury in its deliberations.

In *Clune vs. U. S.*, 40 L. Ed. 269, 159 U. S. 590, the court was called to pass upon a bill of exceptions and statement of facts which, in incompleteness, presented a problem almost as difficult as the present case. The court said:

> "Where a case rests upon circumstantial evidence, much discretion is left to the trial court, and its rulings admitting such evidence will be sustained if the evidence admitted tends even remotely to establish the ultimate fact."

Citing 34 L. Ed. 954; 37 L. Ed. 118; 37 L. Ed. 996; 40 L. Ed. 237.

The defendant was accorded a fair trial and the conviction should be sustained.

Respectfully submitted,

CLAY ALLEN,
United States Attorney.
ALBERT MOODIE,
Assitant United States Attorney.